

**IIEC LIMITED COMMENTS ON COMMISSION'S AUTHORITY
TO IMPLEMENT SUSTAINABLE ENERGY PLAN**

The Illinois Industrial Energy Consumers ("IIEC") have serious reservations about the Commission's ability to implement the Governor's Sustainable Energy Plan (the "Plan") in its present form. IIEC opposes mandatory standards for renewables and energy efficiency. Such programs should be optional and voluntary for customers. IIEC's failure to comment on any other plan or proposal or its failure to comment on the legality of any particular aspect of the Plan should not be considered as an endorsement of, or agreement with the Commission's authority to implement such a plan or any particular aspect of the Plan. IIEC expressly reserves the right to raise questions about the Commission's authority in any formal Commission or judicial proceeding subsequent to these informal workshops.

The Renewable Portfolio Standard and the Energy Efficiency Standard as proposed in the Plan cannot be implemented as proposed because the Commission does not have authority to compel Alternative Retail Electric Suppliers ("ARES") to purchase a particular kind or quantity of electricity in the wholesale market, nor does the Commission have the power and authority to compel alternative retail electric suppliers to purchase or provide particular types of products, such as energy efficiency products, in the retail market, all as contemplated by the Plan. The Plan's requirement that alternative retail electric suppliers purchase a particular kind of electric power and energy in order that eight percent (8%) of their sales be from renewables, runs afoul of the federal government's exclusive jurisdiction over wholesale transactions. The ability of the Commission to impose a mandatory numeric standard for renewables or for energy efficiency is questionable.

I. The Commission has no authority except that which is expressly granted or authorized by Statute and the Statute does not grant the Commission the necessary authority.

Under Illinois law, the Illinois Commerce Commission ("Commission") has no authority except that which is expressly granted or authorized by statute. See, City of Chicago v. Illinois Commerce Commission, 79 Ill. 2d 213, 217-18, 402 N.E. 2d 595, 597 (1980).

The Commission's authority over ARES is specified in Section 16-115, 16-115A, and 16-115B of the Public Utilities Act ("PUA"). (220 ILCS 5/16-115, 16-115A, and 16-115B). Section 16-115 requires that ARES obtain a certificate of service authority from the Commission in accordance with that Section. (220 ILCS 5/16-115(a)). Section 16-115 does not provide the Commission with the authority to require ARES to purchase electricity of a particular type or quantity on the basis of long-term wholesale supply contracts. Nor does this Section provide the Commission with authority to require ARES to sell particular kinds of products or services to their customers. Nor does it empower the Commission to require those customers to purchase and/or pay for a particular kind of electricity or product or service from a ARES or any other supplier.

Section 16-115A describes the obligation imposed on the ARES once it is certified under Section 16-115. It requires ARES to comply with certain specified provisions of the PUA which relate to the provision of, denial of and termination of gas and electric service to residential customers under Sections 8-201 through 8-207 of the PUA (220 ILCS 5/8-201 and 8-207). (220 ILCS 5-16-115A(a)(i). This section requires the ARES to: meet certain standards of service specified under Section 8-301 of the PUA (220 ILCS 5/8-301);

to safely maintain plants and equipment under Section 8-505 of the PUA (220 ILCS 5/8-505); and meet non-energy vegetation activity requirements under Section 8-505.1 of the PUA (220 ILCS 5/8-505.1). (220 ILCS 5/16-115A(a)(i)). Section 16-115A requires the ARES to meet other service, billing and marketing requirements. (220 ILCS 5/16-115A (b), (c), (d) and (e)). Section 16-115A allows an ARES to limit the overall size and availability of service under the circumstances described therein. (220 ILCS 5/16-115A(f)). Finally, Section 16-115A allows the ARES to offer services to membership organizations, etc. (220 ILCS 5/16-115A(g)). However, this section does not authorize the Commission to require an ARES to purchase electricity of a particular kind or in particular quantities pursuant to long-term wholesale purchase agreements or to offer particular kinds of products and services.

Section 16-115B provides the Commission with authority to entertain and dispose of complaints against ARES alleging violation of or non-compliance with Section 16-115 and Section 16-115A. It further provides the Commission with authority to hear complaints, against ARES serving customers with maximum demands of less than 1 MW, relating to failure to provide service in accordance with contract terms. It provides the Commission with authority to hear and dispose of complaints that an ARES has violated a delivery service tariff and/or agreement, or that an ARES has failed to comply with certain designated portions of the PUA. However, this section does not provide the Commission with authority to require an ARES purchase a particular kind of electric power and energy in a particular quantity pursuant to a long term wholesale supply contract. Nor does it give the Commission the authority to require an ARES to provide particular kinds of products and services to its customers. Nor does it provide the Commission with authority to require that customers of an ARES purchase and/or pay for particular kinds of power and energy.

In addition, the PUA was originally designed to give the Commission jurisdiction and authority over public utilities, not third party suppliers of electricity. Thus, no other element of the PUA is applicable to ARES or the service and products they provide.

Therefore, because the Commission has no authority except that which is expressly granted by the PUA and because the PUA gives the Commission only very limited authority over ARES, and because that authority does not include the ability to compel an ARES to purchase particular kinds and quantities of electricity pursuant to a long term wholesale purchase agreement, and to offer a particular kind of service or product, the Commission has no authority to impose a mandatory RPS or energy efficiency standard on ARES or their customers.

In particular, IIEC does not believe the Commission has the authority to compel a customer, who does not purchase power and energy from a public utility, to purchase and/or pay for a particular kind of power and energy or a particular kind of product or service under the current structure of the power industry in the State of Illinois.

Even if the PUA were interpreted in a way which presumed the Commission could require ARES to purchase their electrical product from a particular kind of electricity generation resource, pursuant to long term wholesale purchase agreements, the Commission could run afoul of the doctrine of federal preemption.

In addition, even if the PUA were interpreted in a way which presumed the Commission did have adequate authority to force ARES to comply with the mandatory standard requiring them to purchase

electricity at wholesale exclusively from renewable resources located in the State of Illinois, such an interpretation could render the provisions of the PUA upon which it is based unconstitutional as applied for the reasons stated below. In such an event, all the provisions of the Customer Choice and Rate Relief Law of 1997 would be endangered under the negative savings clause adopted with that law. (See P.A. 90-561, Art. I, Sec.15).

The portion of the Plan that may require the purchase of electricity and related services exclusively from suppliers within the State of Illinois could be unconstitutional under the dormant commerce clause. (U.S. Constitution, Art. I, Sec. 8). The negative or dormant commerce clause principle is one which assumes that state and local laws are unconstitutional if they place an undue burden on interstate commerce. See Camps Newfoundland et al., v. Town of Harrison Maine, 520 U.S. 564, 117 S. Ct. 1590, 137 Ill.L.Ed. 2d 852 (1997). On its face a requirement that ARES purchase a particular kind or quantity of electricity exclusively from suppliers located within the State of Illinois discriminates against interstate commerce. Such a requirement would deprive Illinois end-use customers of access to potentially lower cost wind resources located within the Midwest ISO and in states which have potentially better, cheaper and more extensive wind resource capability than Illinois.

Finally, the ability of the Commission to impose a mandatory numeric standard for renewables and/or energy efficiency is generally questionable. As noted above, the Commission has only that authority which is granted by the PUA. There is no express provision in the PUA that allows the Illinois Commerce Commission to implement mandatory renewable portfolio standards or energy efficiency standards. Indeed, the General Assembly has repeatedly refused to enact legislation which would have permitted or required the Commission to implement such a standard or standards. In addition, the General Assembly removed from the PUA the only provisions that expressly required the Commission and utilities to consider use of renewables and energy efficiency.

II. Cost Recovery

The Plan does not reference a particular mechanism for cost recovery.¹ However, IIEC believes it would be inappropriate to recover the costs associated with the implementation of a renewable portfolio standard and/or energy efficiency standard from large industrial customers. These customers, pursuant to price signals for electricity sent by the market, have implemented and will pursue their own energy efficiency measures and have acquired renewable resources for their electricity and other operational needs. IIEC companies as long ago as 1981 have implemented energy efficiency programs in their facilities, including, but not limited to, the installation of high efficiency motors, high efficiency lighting, cogeneration, generation fueled by landfill gas, waste gas from production operations and other forms of fuel. They have spent millions of dollars doing so. They did so in response to the high electricity cost within the State of Illinois. They require no further incentive to undertake such programs. The market price of electricity gives more than adequate incentive for these customers to find economic and practical ways to reduce their consumption of

¹However, it raises issues about application of “least cost” standards because it appears to imply “reasonable cost” standards should be used instead.

electric energy or to use electric energy more efficiently. They do not need to be participants in any mandatory programs relating to renewables on energy efficiency. They would welcome programs which are optional or voluntary from the large customer's point of view.

In addition, requiring these customers to pay for resources and programs that are primarily beneficial to other customer or customers groups deprives them of the benefit of the investments they have already made to reduce their electric energy consumption and increase their electric energy efficiency. Therefore, under no circumstances should these customers be subject to collection mechanisms approved for the renewable portfolio and energy efficiency standards even if the Commission concludes that it has the authority to implement such standards and that it is desirable to do so.

IIEC opposes cost recovery mechanisms based on a non-bypassable cents per kwh surcharge.

III. Prudence

To the extent any utility in Illinois incurs costs associated with the implementation of the Plan, assuming the Plan is implemented, it should be entitled to recover its prudently incurred costs in accordance with the PUA. The cost of implementing such a program should be reflected in the utility's revenue requirement and treated the same as other costs and expenses incurred by the utility. There should be no special treatment of these costs.

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